In The

Supreme Court of the United States

October Term, 1976

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No. 76-1820

—o—

JONATHAN W. BATTEN,
Petitioner,

vs.

THE STATE OF IOWA,
Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

—o—

BRIEF FOR RESPONDENT IN OPPOSITION

—o—

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OPINION BELOW

The opinion of the Iowa Supreme Court, *State v. Batten,* 249 N. W. 2d 865 (Iowa 1977), is set forth in the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in Paragraph 2 of the Petition.

QUESTIONS PRESENTED

1. Was Petitioner denied a fair and impartial trial as guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution because of the reference to Petitioner's alleged prior criminal activities by a prosecution witness at his trial and because of the trial court's denial of Petitioner's motion for a new trial?

2. Was Petitioner compelled to be a witness against himself in violation of the Fifth Amendment to the United States Constitution by the ruling of the trial court on Petitioner's motion for a mistrial following the reference to Petitioner's alleged prior criminal activities by a prosecution witness?

STATEMENT OF THE CASE

On the evening of June 5, 1974, Petitioner contacted one Miss Christine Cox and asked her if she desired to purchase some heroin. Miss Cox reported this contact to police the following day, and was given one hundred dollars by officers of the Davenport, Iowa, Police Department with which to purchase a quantity of heroin. Miss Cox returned to Petitioner's house, under police surveillance, and gave him the money.

As Miss Cox was leaving Petitioner's residence, one Mimi Ehrler arrived, and both women went into Petitioner's house. Miss Cox reported to the surveillance officers that Petitioner gave the $100 to Mrs. Ehrler and

then called his wife at work, telling her to give Mrs. Ehrler another $100 when Ehrler arrived. Mrs. Ehrler reported to Miss Cox and Petitioner that her husband Steve would not make the trip to Chicago to pick up the heroin, but rather a man named Bill would do so. Continued police surveillance of Mrs. Ehrler led to the observation of a meeting between Ehrler and Petitioner's wife and a trip by Mrs. Ehrler to the residence of a Bill Logel. Later in the evening of June 7, 1974, Mrs. Ehrler and Mr. Logel were seen in Mrs. Ehrler's car headed toward Chicago on Interstate 80.

Miss Cox met Petitioner in the early morning of June 8, 1974, and was told, in a conversation overheard by police by means of a transmitter on Miss Cox' body, that the heroin would arrive later that morning and that she could pick it up at his house.

At about 3:00 a.m., police observed the Ehrler vehicle pull up to the rear of the Ehrler residence. The three occupants of the vehicle were placed under arrest and were searched. Quantities of heroin were discovered in the purses of Mrs. Ehrler and Mrs. Logel and in the Ehrler vehicle. As this search was being conducted, an automobile operated by Petitioner pulled into the driveway behind the Ehrler vehicle. Police informed Petitioner that he was under arrest. Petitioner attempted to back out of the driveway and leave. Police officers stopped Petitioner at gunpoint and placed him in custody.

Petitioner was charged by County Attorney's Information with the crime of conspiracy to possess a controlled substance with intent to deliver in violation of Iowa Code Section 204.401 (1) (a) (1973). Prior to his

trial, Petitioner filed a motion in limine asking that no mention of, or reference to, his prior felony convictions be made by the County Attorney. Trial court entered an order to that effect. On defense motion, this order was amended to prohibit witnesses for the State from offering testimony as to Petitioner's prior use of, or association with, illegal drugs.

Upon voir dire examination of the jurors and in his opening statement to the jury, Petitioner's counsel indicated that Petitioner would testify on his own behalf; that the trial would essentially be a credibility contest between the State's main witness, Miss Christine Cox, and Petitioner.

The State's first witness, Miss Cox, in response to question about her possible prior heroin use, stated that she had used it "a couple of times with John Batten [Petitioner]." Upon defense counsel's objection, the trial court ordered the response stricken from the record and instructed the jury to disregard it. A motion for a mistrial was denied out of the hearing of the jury. Miss Cox' account of the events of June 6 to June 8, 1974, was corroborated by the testimony of four law enforcement agents.

After the State rested, defense counsel moved for a directed verdict, and the motion was denied. The defense then presented the testimony of six witnesses and the Petitioner to support the defense theory that Petitioner was merely on the scene of the arrest to repay money which he owed the Ehrlers for a car which they had purchased from him but had been repossessed by a creditor of a prior owner.

The jury returned a verdict of guilty, and Petitioner moved for a new trial on the basis of Miss Cox' remark about his prior heroin use. This motion was denied on June 25, 1975, after a hearing.

Petitioner was sentenced to be imprisoned for not more than ten years at the Iowa Men's Reformatory and to pay a fine of one thousand dollars.

The Iowa Supreme Court affirmed Petitioner's conviction in a per curiam opinion which is reprinted in the Appendix to the Petition.

ARGUMENT

A trial court has broad discretion in ruling upon a motion for a new trial under both Iowa and federal law. *State v. Kramer,* 231 N.W.2d 874 (Iowa 1975); *United States v. Johnson,* 327 U.S. 106 (1946); *United States v. Anderson,* 509 F.2d 312 (D.C. Cir. 1974), cert. denied 420 U.S. 991 (1975). See Iowa Code Section 787.3 (8) (1977); Rule 33, Federal Rules of Criminal Procedure. Sound policy underlies such a view. The trial judge has personal familiarity with the evidence and conduct of the trial and is in a far better position to decide the mixed factual and legal questions involved in issues of prejudice and newly-discovered evidence. Therefore, the determinations of the trial court are entitled to great weight in an appellate proceeding.

Application of this principle to the present case requires denial of the petition for a writ of certiorari. The Scott County District Court, Honorable Lowell D. Phelps, Judge, denied Petitioner's motion for a mistrial, stating:

> "The Court at this time, after due consideration, has determined that the statement was not too prejudicial to the defendant that a mistrial should be declared." (R. p. 81).

In denying Petitioner's motion for a new trial the Court stated:

> "This matter was taken up by defense counsel immediately after the statement was made, and the Court at that time, on due consideration, concluded that the statement was not so prejudicial to defendant as to require a mistrial. The Court at the time the statement was made sustained the objection to strike it from the record and at that time instructed the jury to completely ignore the statement. At the time it was the feeling of the Court that this did amply protect the defendant and as the case developed the Court had no reason to change its feeling in that matter, and at this time does not feel that the statement by Christine Cox was of such a prejudicial nature that it required a mistrial, especially in view of the fact that the Court instructed the jury to completely disregard it." (R. p. 424).

Petitioner merely asks this Court to substitute its judgment on the largely factual question of the existence of prejudice for that of the trial judge, something which this Court should only do if there is no support in the record for the decision of the trial court. See *United States v. Johnson, supra.* The State of Iowa contends that the judgment of the trial court was correct and was supported by the record.

In evaluating the decision, it is important to remain cognizant of the principle that a defendant is not entitled to a perfect trial, but a fair one. *Bruton v. United States,* 391 U. S. 123, 135 (1968); *Lutwak v. United States,* 344 U. S. 604, 619 (1953). As the Fifth Circuit Court of Appeals stated in *Leonard v. United States,* 386 F. 2d 423, 425 (5th Cir. 1967). "The Constitution does not require error-free trials; it requires fair trials. The distinction is vital as long as human beings participate. . . ." This Court has noted that error will creep into virtually every trial. *Bruton v. United States, supra* at 135.

It is equally necessary to be aware that Petitioner seeks review in this Court, as he must, under the Due Process Clause, not under the broad supervisory powers of this Court over the federal judicial system. This distinction is significant, since not every error that might be sufficient for reversal under the supervisory power is sufficient to constitute a due process violation. *Donnelly v. De Chrisiforo,* 416 U. S. 637, 642 (1974). "Before a federal court may overturn a conviction resulting from a state trial . . . , it must be established not merely that the [act complained of] is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." *Cupp v. Naughton,* 414 U. S. 141, 146 (1973). Respondent contends that any error which may have occurred in Petitioner's trial was not sufficient to reach the level of a denial of due process.

The practice of striking offensive testimony from the record and admonishing the jury to ignore it, followed by the trial court in this case, has been recognized as normally being sufficient to cure any error which may have resulted

from the admission of such testimony. As this Court stated in *Hopt v. Utah,* 120 U. S. 430, 438 (1887):

> "It is true, in some instances, there may be such strong impressions made upon the minds of a jury by illegal and improper testimony, that its subsequent withdrawal from the case will not remove the effect caused by its admission; and in that case the original objection may prevail on writ of error. But such instances are exceptional. The trial of a case is not to be suspended, the jury discharged, a new one summoned, and the evidence retaken, when an error in the admission of testimony can be corrected by its withdrawal with proper instructions from the court to disregard it."

This view was reaffirmed in *Bruton v. United States, supra* at 134, where this Court acknowledged:

> "Not every admission of inadmissible hearsay or other evidence can be considered reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. . . . It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information."

Examination of cases decided by this Court reveals that this is such a case. In *Hopt v. Utah, supra,* the prosecuter in a murder trial asked a physician on direct examination from which direction the fatal blow was delivered. Defense counsel objected on the ground that this was a jury question, but the objection was overruled. The doctor then testified that the blow was struck in such a manner as to incriminate the defendant, who was left-handed. The following morning the prosecutor moved the court to strike the testimony and to admonish the jury to disregard it. The motion was granted, and the instruction given. On

appeal, this Court held that the testimony was proper as giving an expert opinion, but also held that even if it were not the withdrawal of the evidence and the instruction to the jury was sufficient to have cured any error. Surely *Hopt* requires denial of the petition in the instant case where the offensive testimony did not tend to establish the defendant's guilt for the crime charged and the withdrawal and curative instruction occurred immediately upon the admission of the prohibited testimony.

In *Frazier v. Cupp,* 394 U. S. 731 (1969), the prosecutor in his opening remarks summarized the expected testimony of a co-defendant who had pleaded guilty but had not yet been sentenced. Although the defense counsel had warned of the possibility that the co-defendant might refuse to testify, the prosecutor had sufficient reason to believe he would. During this portion of his opening statement, the prosecutor referred to a paper which the State conceded could have been interpreted by the jury as a confession. At the close of the opening remarks, defense counsel moved for a mistrial. The judge denied the motion but instructed the jury that the remarks were not evidence and were not to be considered as such. When the co-defendant was called to testify, he refused to answer any questions, exercising his Fifth Amendment rights. Defense counsel again moved for a mistrial, which motion was again denied. This Court refused to allow a writ of habeas corpus to issue, finding the instruction by the trial judge sufficient to have cured any error. The remarks were an objective summary of evidence which the prosecutor in good faith expected to produce. The statements could be separated from the rest of the testimony, and therefore no retrial was required.

The instant case is merely the other side of the *Frazier* coin. The prosecutor was faced with a statement by a witness which he in good faith had not expected. The remark did not relate to the issue confronting the jury—Petitioner's guilt or innocence—and could, therefore, be separated logically by the jurors from the rest of the testimony. *Frazier* would seem to indicate that the fundamental fairness of Petitioner's trial was not undermined by comment of Miss Cox.

In *Cupp v. Naughton, supra,* this Court considered the problem of a jury instruction which stated that the testimony of a witness was to be presumed truthful, although the presumption could be overcome in various ways. The trial court also gave strong instructions on the burden of proof beyond a reasonable doubt and on the subject of the defendant's right not to testify, which he had exercised, and the impermissibility of drawing any inference of guilt from this exercise. Acknowledging that the United States Courts of Appeals had universally disapproved the instruction under their supervisory powers, this Court refused to release the habeas petitioner despite its use. When the entire trial was examined, the Court found that the strong instructions on burdens of proof and the right not to testify were sufficient to vitiate whatever prejudice may have resulted from a single, isolated instruction.

This same totality of circumstances test was applied to improper comments by the prosecutor in his closing remarks in *Donnelly v. De Christiforo, supra.* The Court found that the comments were, at best, arguably prejudicial, that a curative instruction was given immediately by the trial judge, and that the comment was only a brief part of the overall trial. These factors led the Court to

conclude that the comments did not so prejudice the defendant as to constitute a due process violation, and the habeas corpus petition was denied.

Naughton and *De Christiforo* clearly stand for the proposition that an improper comment during the course of the trial which by itself appears prejudicial may, in fact, not violate due process rights where a curative instruction is given and the comment is only a minor part of the trial proceeding. This proposition requires denial of the petition in this case, since the improper remark by the witness was only a minor part of the trial and the judge gave a clear and immediate curative instruction.

The Circuit Courts have frequently faced the problem of inadmissible comment by a witness about prior criminal activities of the defendant similar to that for which he was being tried. Almost without exception, they have affirmed the convictions when the comments were followed by a curative instruction from the trial court. See, e.g., *United States v. Boerner,* 508 F. 2d 1064 (5th Cir. 1975), cert. denied 421 U. S. 1013 (1975) (importation of illegal aliens); *United States v. Resnick,* 488 F. 2d 1165 (5th Cir. 1974), cert denied 416 U. S. 991 (1974) (firearms sales violations); *United States v. Rines,* 453 F. 2d 878 (3rd Cir. 1971) (bank robbery); *United States v. Kidd,* 446 F. 2d 1385 (5th Cir. 1971) (interstate transportation of forged securities). Identical results have been obtained in trials for violations of narcotics laws. See, e.g., *United States v. Snow,* 521 F. 2d 730 (9th Cir. 1975), cert. denied 423 U. S. 1090 (1976); *United States v. Jones,* 491 F. 2d 526 (9th Cir. 1973), cert. denied 417 U. S. 970 (1974). The violation of a pre-trial order prohibiting the introduction

of such testimony does not alter the result. See *United States v. Sarvis,* 523 F. 2d 1177 (D. C. Cir. 1975).

The general principle of these cases is that in applying the totality of circumstances test of prejudice, see *Naughton* and *De Christiforo, supra,* the major factors to be considered are the subjective intent of the prosecutor, the strength of the government's case independent of the offending remark, and the presence or absence of a clear instruction by the court to ignore the comment. Where the prosecutor made a good faith effort to avoid the comment, the government's case was strong, and the judge gave a clear and immediate instruction, the courts have almost universally found an absence of prejudice. The Respondent contends that the present case satisfies all three criteria.

The prosecutor in this case did not attempt to elicit any reference to Petitioner's possible prior heroin usage. He complied with the court's order to instruct the State's witnesses not to mention the subject (R. p. 58). The question was not designed to reveal such information. The comment was merely an inadvertance, one of the instances "where inadmissible evidence creeps in." *Bruton v. United States, supra* at 135. No prosecutorial bad faith can be discovered on this record.

The State's case against Petitioner was overwhelming. Miss Cox, previously established as reliable in several cases, testified as to a credible series of events linking Petitioner to a conspiracy. The police officers corroborated this testimony, including electronic interception of a conversation in which Petitioner stated that the heroin would be delivered to his house and that several persons

were waiting there to purchase quantities of the drug. As defense counsel indicated in his opening argument, the trial was a credibility contest between these witnesses and those of the defense. Petitioner simply lost that contest and now seeks release on the basis of a brief comment by a State witness, despite the trial court's swift action to remedy any prejudice which may have resulted.

The instruction to the jury was clear and immediate. Upon hearing the objection and motion for mistrial by defense counsel, the judge stated: "The motion will be taken under advisement. But I will strike the answer of the witness from the record and ask the jury to disregard the answer entirely." (R. pp. 56-57). No further instruction was requested by counsel and therefore any error in the instruction cannot be complained of on direct appeal. *State v. Lyon,* 223 N. W. 2d 193 (Iowa 1974); *Henry v. Mississippi,* 380 U. S. 443, reh. denied 380 U. S. 926 (1965).

The record substantiates the State's claim that, in the totality of circumstances, Petitioner was not denied a fair trial. The inadvertent reference to his prior criminal activity was only one brief moment in the trial, the jury was immediately instructed to ignore the comment, and both before and after the comment, the State's case provided ample evidence upon which the jury could convict Petitioner.

Petitioner also argues that as a result of the improper comment he was compelled to testify, violating his Fifth Amendment rights. To support this claim, he cites the trial court's statement in ruling on the motion for a mistrial that when Petitioner testified he could deny the allegations of heroin usage if he desired. The State contends

that in no meaningful sense of the word was petitioner "compelled" to testify by either the testimony itself or the judge's ruling on the motion for a mistrial.

In both the voir dire and his opening statement, defense counsel had informed the jurors that, although not required to do so, Petitioner intended to testify in his own behalf (See R. p. 29). The judge merely relied upon these statements in making his comments on the ruling (R. pp. 81-82). It is important to note that prior to any mention of Petitioner's own testimony, Judge Phelps indicated that he did not consider the remarks prejudicial (R. p. 81). The inference to be drawn from a reading of the entire ruling is that the judge did not consider the remarks prejudicial, but if Petitioner did he was free to deny them. Petitioner's testimony was not necessary to alleviate any prejudice, and he was not "compelled" to take the stand.

The ruling by the judge was made in chambers, so that any mention of Petitioner's testifying occurred out of the hearing of the jury. Therefore, any analogy to the cases concerning comment to the jury on the defendant's failure to testify, e.g. *Griffin v. California,* 380 U. S. 609, reh. denied 381 U. S. 957 (1965), is inappropriate.

As noted previously, the State produced a substantial amount of evidence of Petitioner's guilt independent of the improper remark. The weight of this evidence was certainly a stronger pressure upon Petitioner to testify than was the brief remark about his prior criminal activities. This Court has acknowledged that such pressure may occur, but has held that it is not compulsion within the meaning of the Fifth Amendment. *Williams v. Florida,* 399 U. S. 78, 84 (1970). It is difficult to find the basis

for a credible claim of compulsion given the existence of such strong, yet constitutional, pressure as was exerted by the bulk of the State's evidence.

The likelihood of impermissible compulsion is further reduced by the Petitioner's promise to the jury that he would testify. Experienced counsel such as Petitioner's would recognize the possible negative psychological effect upon the jurors of breaking such a promise. Thus, apart from the fact that the promise belied any compulsion to testify from outside sources, the promise itself became a strong compelling force. This Court has held that defendants are not constitutionally immunized from the potentially disastrous effects of such tactical decisions. *McGautha v. California,* 402 U. S. 183 (1971); *Williams v. Florida, supra.* Petitioner and his counsel made such a decision and should not now be allowed to escape its consequences because of a minor intervening factor which could not have altered those consequences.

The compulsion to testify upon Petitioner resulting from the improper comment of the government's witness was non-existent or, at most, minute when compared to the pressures created by the weight of the rest of the evidence and Petitioner's promise to testify. Petitioner's Fifth Amendment rights were not violated by either the witness' remark or the judge's ruling on the motion for a mistrial, and the petition for a writ of certiorari should be denied.

———o———

CONCLUSION

The trial court did not violate Petitioner's due process rights by denying his motion for a new trial or motion for a mistrial. The reference to Petitioner's prior drug usage was brief and was not intentionally elicited by the prosecutor. The remark was immediately stricken from the record, and the jury was instructed to ignore it. Substantial evidence independent of the remark was presented to prove Petitioner's guilt. The trial judge ruled at the time of the motion for a mistrial that the remark was not prejudicial and reaffirmed his finding at the conclusion of the trial. The record clearly establishes that the trial court did not abuse its discretion in denying the motion for a new trial.

The trial court did not compel Petitioner to be a witness against himself by its ruling on the motion for a mistrial. The court found the remark in question not to be prejudicial and merely commented that Petitioner could deny the allegations of prior criminal conduct if he chose. Petitioner had indicated to the jury that he would testify at the trial, and the court merely relied upon these representations. Any pressure to testify caused by the ruling pales into insignificance when compared to the pressures created by the sheer weight of the State's evidence and the Petitioner's own promise to the jury that he would testify. In no meaningful sense of the word was Petitioner compelled to take the witness stand by the casual remark of the prosecution witness.

Although this Court has not previously considered a case involving the factual situation presented by this

petition, the principles of due process and self-incrimination have been considered in analogous contexts, and this Court has uniformly found no violation of either constitutional provision. This is not truly a case "[w]here a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." Rule 19, Rules of the United States Supreme Court. Prior decisions of this Court have made the result in Petitioner's case clear. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ray Sullins, Assistant Attorney General for the State of Iowa, hereby certify that on the 20th day of July, 1977, I mailed three (3) copies of Brief for Respondent in Opposition, correct first class postage prepaid, to:

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I further certify that all parties required to be served have been served.

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